

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

|                            |   |                         |
|----------------------------|---|-------------------------|
| STATE OF WASHINGTON,       | ) |                         |
|                            | ) | No. 63412-7-I           |
| Appellant,                 | ) |                         |
|                            | ) | DIVISION ONE            |
| v.                         | ) |                         |
|                            | ) | UNPUBLISHED OPINION     |
| CHRISTOPHER DANIEL BOWERS, | ) |                         |
|                            | ) |                         |
| Respondent.                | ) | FILED: November 2, 2009 |
|                            | ) |                         |

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Appelwick, J. — The trial court initially sentenced Bowers for multiple offenses on the same day, imposing both DOSA and non-DOSA sentences. The court ran the DOSA treatment program consecutive to the confinement period on a non-DOSA sentence. Bowers later sought resentencing, arguing that his sentence was an unlawful hybrid under State v. Smith, 142 Wn. App. 122, 173 P.3d 973 (2007). In response, the court vacated the DOSA sentence and resentenced Bowers at the top of the standard range, to run concurrent with the other sentences initially imposed. We affirm.

**FACTS**

On December 12, 2006, Christopher Bowers pleaded guilty to multiple current offenses.<sup>1</sup> Under the facts at issue in this case, Bowers pleaded guilty to forgery (count I) and second degree identity theft (count II). The court

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<sup>1</sup> At the same plea hearing, Bowers pleaded guilty to charges in four other cases, for a total of six additional counts of forgery, one count of possession of a controlled substance, and one count of first degree identity theft.

sentenced him for all ten current offenses on February 12, 2007.

Bowers requested a drug offender sentence alternative (DOSA) on all counts. The court imposed an 80 month sentence on the first degree identity theft charge (within the standard range).<sup>2</sup> On the two offenses at issue here, the court imposed DOSAs. For both of the offenses, the court sentenced Bowers to serve the midpoint of the standard range, half of which would be spent in confinement, and half of which would be spent in treatment (25 months confinement for second degree identity theft, and 12.75 months confinement for forgery), to run concurrently. The court anticipated that the treatment would be consecutive to the total period of confinement and probation of both DOSA and non-DOSA sentences, while all the other sentences would be concurrent. The total time to be served on all charges was 80 months confinement, 9 to 12 months probation, followed by 25 months treatment.

A year later, the defendant filed a pro se motion to modify his sentence. He then retained counsel to represent him in the matter. Bowers argued that the DOSAs were illegal hybrid sentences, as the DOSA treatment period for the forgery and second degree identity theft charges would be consecutive to the confinement term for the non-DOSA sentence. Bowers argued that the court was obligated to resentence him to standard range concurrent sentences.

The trial court, agreeing with Bowers and relying on Smith, 142 Wn. App. 122, vacated his sentence. The court resentenced Bowers to serve 57 months

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<sup>2</sup> The court imposed concurrent standard range sentences for the other offenses not at issue in this appeal. For the possession of a controlled substance, the court also imposed a 9–12 month period of community custody.

for second degree identity theft and 29 months for forgery. As these sentences were concurrent with the sentences imposed in the other cases, Bowers's total confinement period remained 80 months. As a result, Bowers is no longer subject to the 25 months of DOSA treatment.<sup>3</sup>

The State timely appealed.<sup>4</sup>

#### DISCUSSION

Statutory interpretation is a question of law that this court reviews de novo. State v. Williams, 158 Wn.2d 904, 908, 148 P.3d 993 (2006).

The court initially sentenced Bowers for the second degree identity theft and forgery under DOSA. RCW 9.94A.660. The DOSA program authorizes courts to sentence an eligible offender<sup>5</sup> to either a prison-based alternative or a residential chemical dependency treatment-based alternative. RCW 9.94A.660(4). The court elected to sentence Bowers under the prison-based alternative, which provides for “[a] period of total confinement in a state facility for one-half of the midpoint of the standard sentence range or twelve months, whichever is greater.” RCW 9.94A.660(5)(a). The remainder of the sentence is served under community custody, and must include substance abuse treatment. RCW 9.94A.660(5)(b).

The Sentencing Reform Act of 1981<sup>6</sup> (SRA) mandates that where a person is sentenced for two or more current offenses, as Bowers was here, the

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<sup>3</sup> He is still subject to 9–12 months of community custody, however, on a different charge.

<sup>4</sup> The State appealed the case to the Supreme Court for direct review, but the Court transferred the case to this court for a decision.

<sup>5</sup> The parties do not dispute that Bowers was eligible, although the State spends considerable time arguing it.

<sup>6</sup> Chapter 9.94A RCW.

sentences shall be served concurrently. RCW 9.94A.589(1)(a). Bowers's DOSA sentences, then, were to be concurrent with the sentences imposed on that same day in different cases, including the 80 month sentence on the first degree identity theft charge.

The period of community custody is tolled under certain circumstances. The first sentence of former RCW 9.94A.625(3)<sup>7</sup> states, “[a]ny period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason.” This court, analyzing former RCW 9.94A.625, explained the purpose of the statute, which is to ensure that the conditions of community custody are met: “To ensure compliance with community custody conditions, [former] RCW 9.94A.625 states that the period of community custody shall toll when an offender is unavailable for supervision.” In re Pers. Restraint of Albritton, 143 Wn. App. 584, 594, 180 P.3d 790 (2008).

The State suggests that “confinement for any reason” language of former RCW 9.94A.625(3) tolled the community custody portion of Bowers's DOSA during the remainder of his confinement period for the first degree identity theft (which ran concurrently with the shorter DOSA confinement period for the forgery and second degree identity theft). Because former RCW 9.94A.625(3) tolled the community custody, the State argues that the initial sentence was lawful.

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<sup>7</sup> Recodified as RCW 9.94A.171(3) effective August 1, 2009, but the tolling provision remains the same.

This court addressed the effect of the SRA's concurrency requirement on situations where an offender is sentenced to both a DOSA and non-DOSA sentence in Smith, 142 Wn. App. 122. Smith presented a similar sentencing scheme as the current case.<sup>8</sup> There, the trial court imposed on Smith both a DOSA and a non-DOSA sentence. Id. at 123. The confinement portion of Smith's DOSA was to run concurrently with the non-DOSA sentence. Id. However, the confinement portion of his DOSA was shorter than the confinement of his non-DOSA sentence. Id. Consequently, Smith was to remain in confinement to finish his non-DOSA sentence and would then serve the treatment portion of his DOSA in community custody. Id. at 126. Relying on State v. Grayson, 130 Wn. App. 782, 125 P.3d 169 (2005), this court held that, because the community custody portion of Smith's sentence ran consecutively to his non-DOSA sentence, Smith had received a hybrid sentence that violated the concurrency requirement of RCW 9.94A.589.<sup>9</sup> Id. at 128–29.

The State acknowledges that Bowers's sentence was a hybrid sentence, which Smith and Grayson prohibit, but argues that Smith was wrongly decided.

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<sup>8</sup> The subsection of the statute at issue in Smith was RCW 9.94A.589(3), pertaining to a situation where a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, but who has since committed another crime. 142 Wn. App. at 127. Here, the subsection mandating concurrent sentences is RCW 9.94A.589(1)(a), pertaining to a situation where a person is to be sentenced for two or more current offenses. However, this small distinction is of no moment, as the material issue in this case is the concurrency requirement.

<sup>9</sup> In its reply brief, the State proposes that community custody is not imposed under RCW 9.94A.589(1). Rather, it is imposed under RCW 9.94A.660(5)(b). Hence, the community custody portion is not subject to the concurrency requirement of RCW 9.94A.589(1). This argument overlooks the simple reality that Bowers's sentences, which include community custody requirements, for current offenses still fall under the broad language of RCW 9.94A.589(1). The State cites no support for its contention that community custody is not actually part of the sentence as a whole, other than pointing to the DOSA provision that details how the DOSA treatment under community custody functions.

We disagree.

If statutes conflict, they are to be reconciled and effect to be given to each, if this can be achieved without distorting statutory language. State v. Villegas, 72 Wn. App. 34, 39, 863 P.2d 560 (1993). If we apply the tolling provisions of former RCW 9.94A.625(3) only once the period of community custody begins, we find no conflict with the concurrency requirement of RCW 9.94A.589 or the decisions in Smith or Grayson. This is also consistent with statutory purpose articulated in Albritton.

Further, legislative acquiescence may also shed light on legislative intent. If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval. State v. Coe, 109 Wn.2d 832, 846, 750 P.2d 208 (1988). Smith relied on Grayson, and invited the legislature to authorize the type of sentence Smith had received. Smith, 142 Wn. App. at 127, 129. The tolling provisions of former RCW 9.94A.625 were in place when Grayson was decided and remain unchanged. In the several years that have passed, the legislature has not enacted a statute authorizing hybrid sentences.

Bowers initial sentence was an illegal hybrid sentence. If a sentence is illegal, a court has the power and duty to correct it. State v. Smissaert, 103 Wn.2d 636, 639, 694 P.2d 654 (1985). We hold that the trial court did not err in vacating the initial sentence and resentencing Bowers consistent with the SRA's concurrency requirement and Smith's prohibition of hybrid sentences.

We affirm.

*Appelwick J*

WE CONCUR:

*Leach, J.*

*Dwyer, A.C.J.*